

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Nov 04, 2021**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL R.,

Plaintiff,

v.

KILOLO KIJAKAZI,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

NO: 2:21-CV-00004-LRS

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 14 and 16. This matter was submitted for consideration without oral argument. The Plaintiff is represented by Attorney David L. Lybbert. The Defendant is represented by Special Assistant United States Attorney Michael

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<sup>1</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 J. Mullen. The Court has reviewed the administrative record, the parties’  
2 completed briefing, and is fully informed. For the reasons discussed below, the  
3 Court **GRANTS** Defendant’s Motion for Summary Judgment, ECF No. 16, and  
4 **DENIES** Plaintiff’s Motion for Summary Judgment, ECF No. 14.

### 5 **JURISDICTION**

6 Plaintiff Michael R.<sup>2</sup> filed for supplemental security income and disability  
7 insurance benefits on April 24, 2018, alleging an onset date of November 1, 2016.  
8 Tr. 278-85. Benefits were denied initially, Tr. 211-17, and upon reconsideration,  
9 Tr. 220-25. A hearing before an administrative law judge (“ALJ”) was conducted  
10 on November 19, 2019. Tr. 117-62. Plaintiff was represented by counsel and  
11 testified at the hearing. *Id.* The ALJ denied benefits, Tr. 18-47, and the Appeals  
12 Council denied review. Tr. 1. The matter is now before this Court pursuant to 42  
13 U.S.C. §§ 405(g); 1383(c)(3).

### 14 **BACKGROUND**

15 The facts of the case are set forth in the administrative hearing and  
16 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner.  
17 Only the most pertinent facts are summarized here.

18  
19  
20 \_\_\_\_\_  
21 <sup>2</sup> In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first  
name and last initial.

1 Plaintiff was 50 years old at the time of the hearing. Tr. 121. He graduated  
2 from high school, and attended community college. Tr. 313. He lives on the same  
3 farm property as his mother. Tr. 124. Plaintiff has work history as a stock clerk  
4 and tree trimmer. Tr. 151-52. He testified that he could not work after 2016  
5 because of severe migraines and lack of energy. Tr. 138.

6 Plaintiff testified that his life “changed a lot” when he injured his hip in  
7 2019, and at the time of the hearing he could not walk “to the top of the pasture  
8 without stopping to take a break” because of the pain. Tr. 132. He reported that  
9 previous to his hip injury he could drive for long periods of time and walk for a  
10 mile, but after the injury he could not walk a quarter of a mile without stopping due  
11 to pain. Tr. 132-34. Plaintiff testified that 60-70 percent of the time, or more than  
12 a week per month, his migraines are so severe that he cannot function; he has  
13 constant neck discomfort; he cannot crouch or stoop because of hip pain; and his  
14 elbow “locks up” on a daily basis. Tr. 141-46. He can sit for an hour, stand for ten  
15 to fifteen minutes, carry eight pounds in each hand, and he has difficulty bending,  
16 twisting, crouching, and kneeling. Tr. 146-47.

### 17 **STANDARD OF REVIEW**

18 A district court’s review of a final decision of the Commissioner of Social  
19 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
20 limited; the Commissioner’s decision will be disturbed “only if it is not supported  
21 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,

1 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a  
2 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159  
3 (quotation and citation omitted). Stated differently, substantial evidence equates to  
4 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and  
5 citation omitted). In determining whether the standard has been satisfied, a  
6 reviewing court must consider the entire record as a whole rather than searching  
7 for supporting evidence in isolation. *Id.*

8 In reviewing a denial of benefits, a district court may not substitute its  
9 judgment for that of the Commissioner. “The court will uphold the ALJ’s  
10 conclusion when the evidence is susceptible to more than one rational  
11 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.  
12 2008). Further, a district court will not reverse an ALJ’s decision on account of an  
13 error that is harmless. *Id.* An error is harmless where it is “inconsequential to the  
14 [ALJ’s] ultimate nondisability determination.” *Id.* (quotation and citation omitted).  
15 The party appealing the ALJ’s decision generally bears the burden of establishing  
16 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 17 **FIVE-STEP EVALUATION PROCESS**

18 A claimant must satisfy two conditions to be considered “disabled” within  
19 the meaning of the Social Security Act. First, the claimant must be “unable to  
20 engage in any substantial gainful activity by reason of any medically determinable  
21 physical or mental impairment which can be expected to result in death or which

1 has lasted or can be expected to last for a continuous period of not less than twelve  
2 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
3 impairment must be “of such severity that he is not only unable to do his previous  
4 work[,] but cannot, considering his age, education, and work experience, engage in  
5 any other kind of substantial gainful work which exists in the national economy.”  
6 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

7 The Commissioner has established a five-step sequential analysis to  
8 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
9 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
10 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
11 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
12 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
13 404.1520(b), 416.920(b).

14 If the claimant is not engaged in substantial gainful activity, the analysis  
15 proceeds to step two. At this step, the Commissioner considers the severity of the  
16 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
17 claimant suffers from “any impairment or combination of impairments which  
18 significantly limits [his or her] physical or mental ability to do basic work  
19 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
20 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
21

1 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
2 §§ 404.1520(c), 416.920(c).

3 At step three, the Commissioner compares the claimant's impairment to  
4 severe impairments recognized by the Commissioner to be so severe as to preclude  
5 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
6 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
7 severe than one of the enumerated impairments, the Commissioner must find the  
8 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

9 If the severity of the claimant's impairment does not meet or exceed the  
10 severity of the enumerated impairments, the Commissioner must pause to assess  
11 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
12 defined generally as the claimant's ability to perform physical and mental work  
13 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
14 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
15 analysis.

16 At step four, the Commissioner considers whether, in view of the claimant's  
17 RFC, the claimant is capable of performing work that he or she has performed in  
18 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
19 If the claimant is capable of performing past relevant work, the Commissioner  
20 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).  
21

1 If the claimant is incapable of performing such work, the analysis proceeds to step  
2 five.

3 At step five, the Commissioner considers whether, in view of the claimant's  
4 RFC, the claimant is capable of performing other work in the national economy.  
5 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,  
6 the Commissioner must also consider vocational factors such as the claimant's age,  
7 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
8 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
10 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
11 work, analysis concludes with a finding that the claimant is disabled and is  
12 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

13 The claimant bears the burden of proof at steps one through four. *Tackett v.*  
14 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,  
15 the burden shifts to the Commissioner to establish that (1) the claimant is capable  
16 of performing other work; and (2) such work "exists in significant numbers in the  
17 national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,  
18 700 F.3d 386, 389 (9th Cir. 2012).

### 19 ALJ'S FINDINGS

20 At step one, the ALJ found that Plaintiff has not engaged in substantial  
21 gainful activity since the alleged onset date. Tr. 24. At step two, the ALJ found

1 that since the alleged onset date of disability, November 1, 2016, Plaintiff has had  
2 the following severe impairments: right elbow arthritis, lumbar degenerative disc  
3 disease, migraine headaches, and major depressive disorder. Tr. 25. Beginning on  
4 the established onset date of disability, September 17, 2019, Plaintiff has had the  
5 following severe impairments: right hip labrum tear, right elbow arthritis, lumbar  
6 degenerative disc disease, migraine headaches, and major depressive disorder. Tr.  
7 25. At step three, since November 1, 2016, the ALJ found that Plaintiff has not  
8 had an impairment or combination of impairments that meets or medically equals  
9 the severity of a listed impairment. Tr. 27. The ALJ then found that, prior to  
10 September 17, 2019, the date Plaintiff became disabled, Plaintiff had the RFC

11 to perform light work as defined as defined in 20 CFR 404.1567(b) and  
12 416.967(b) except the following. He could occasionally stoop and crouch.  
13 He could never balance, crawl, kneel, and climb ramps, stairs, ladders,  
14 ropes, and scaffolds. He was limited to occasional overhead reaching,  
15 frequent reaching at or below shoulder level, and frequent handling and  
fingering. He could engage in unskilled, repetitive, routine tasks in two-  
hour increments. He could have occasional contact with the public, co-  
workers, and supervisors. He was likely to be 5% less productive [] than the  
average worker in the workplace and absent from work four days per year.

16 Tr. 30 However, the ALJ found that beginning on September 17, 2019, Plaintiff  
17 has the RFC

18 to perform sedentary work as defined as defined in 20 CFR 404.1567(a) and  
19 416.967(a) except the following. He can occasionally stoop and crouch. He  
20 can never balance, crawl, kneel, and climb ramps, stairs, ladders, ropes, and  
21 scaffolds. He is limited to occasional overhead reaching, frequent reaching  
at or below shoulder level, and frequent handling and fingering. He can  
engage in unskilled, repetitive, routine tasks in two-hour increments. He can  
have occasional contact with the public, co-workers, and supervisors. He is



1 likely to be 5% less productive [] than the average worker in the workplace  
2 and absent from work four days per year.

3 Tr. 37.

4 At step four, the ALJ found that since November 1, 2016, Plaintiff has been  
5 unable to perform any past relevant work. Tr. 39. At step five, the ALJ found that  
6 prior to September 17, 2019, considering Plaintiff's age, education, work  
7 experience, and RFC, there were jobs that existed in significant numbers in the  
8 national economy that Plaintiff could have performed, including: small parts  
9 assembler, marker/marketing clerk, and office helper. Tr. 40-41. However,  
10 beginning on September 17, 2019, the ALJ found that considering Plaintiff's age,  
11 education, work experience, and RFC, there are no jobs that exist in significant  
12 numbers in the national economy that Plaintiff can perform. Tr. 41. On that basis,  
13 the ALJ concluded that Plaintiff was not disabled prior to September 17, 2019, but  
14 became disabled on that date and has continued to be disabled through the date of  
15 the decision. Tr. 41.

### 16 ISSUES

17 Plaintiff seeks judicial review of the Commissioner's final decision denying  
18 him disability insurance benefits under Title II of the Social Security Act and  
19 supplemental security income benefits under Title XVI of the Social Security Act  
20 prior to September 17, 2019. ECF No. 14. Plaintiff raises the following issues for  
21 this Court's review:

1. Whether the ALJ properly considered Plaintiff's symptom claims;

1 2. Whether the ALJ properly considered the medical opinion evidence; and

2 3. Whether the ALJ erred at step five.

### 3 DISCUSSION

#### 4 A. Plaintiff's Symptom Claims

5 An ALJ engages in a two-step analysis when evaluating a claimant's  
6 testimony regarding subjective pain or symptoms. "First, the ALJ must determine  
7 whether there is objective medical evidence of an underlying impairment which  
8 could reasonably be expected to produce the pain or other symptoms alleged."  
9 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not  
10 required to show that his impairment could reasonably be expected to cause the  
11 severity of the symptom he has alleged; he need only show that it could reasonably  
12 have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591  
13 (9th Cir. 2009) (internal quotation marks omitted).

14 Second, "[i]f the claimant meets the first test and there is no evidence of  
15 malingering, the ALJ can only reject the claimant's testimony about the severity of  
16 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
17 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
18 citations and quotations omitted). "General findings are insufficient; rather, the  
19 ALJ must identify what testimony is not credible and what evidence undermines  
20 the claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th  
21 Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ

1 must make a credibility determination with findings sufficiently specific to permit  
2 the court to conclude that the ALJ did not arbitrarily discredit claimant's  
3 testimony."). "The clear and convincing [evidence] standard is the most  
4 demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995,  
5 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920,  
6 924 (9th Cir. 2002)).

7 Here, the ALJ found Plaintiff's medically determinable impairments could  
8 reasonably be expected to cause some of the alleged symptoms; however,  
9 Plaintiff's "statements concerning the intensity, persistence, and limiting effects of  
10 these symptoms are not fully supported prior to September 17, 2019" for several  
11 reasons. Tr. 31.

12 *1. Lack of Objective Evidence*

13 First, the ALJ found that the "relatively benign objective findings and  
14 presentations dated prior to September 17, 2019 appear incompatible with the  
15 reported frequency and severity of [Plaintiff's] symptoms and limitations prior to  
16 September 17, 2019."<sup>3</sup> Tr. 32. An ALJ may not discredit a claimant's pain  
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19 <sup>3</sup> Plaintiff does not challenge the ALJ's findings as to his claimed mental health  
20 impairments with specificity in his opening brief; thus, the Court confines its  
21 analysis to Plaintiff's claimed physical impairments. *See Carmickle v. Comm'r of*

1 testimony and deny benefits solely because the degree of pain alleged is not  
2 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857  
3 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*  
4 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). However, the medical evidence is a  
5 relevant factor in determining the severity of a claimant's pain and its disabling  
6 effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 404.1529(c)(2). Here, the ALJ  
7 acknowledged objective findings of moderate degenerative arthritis in the right  
8 elbow; mild to moderate multilevel lumbar facet arthropathy, and mild discogenic  
9 spondylosis at T10-L2, L2-3, and L5-S1; and a long history of migraine headaches  
10 treated with a variety of medications. Tr. 31, 438, 487, 507, 510, 539, 543-44, 549,  
11 592.

12 However, the ALJ also set out the medical evidence contradicting Plaintiff's  
13 claims of disabling limitations. Tr. 568. For example, the ALJ noted that the  
14 February 2016 images of Plaintiff's right elbow showed no joint effusion, normal  
15 alignment without fracture or dislocation, and no periarticular soft tissue  
16 calcifications. Tr. 32, 510. In addition, despite findings of back pain and  
17 tenderness, during examinations prior to September 17, 2019, Plaintiff regularly  
18 exhibited full range of motion, no deformity or scoliosis of lumbar or thoracic  
19

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20 *Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (Court may decline to  
21 address issues not raised with specificity in Plaintiff's opening brief).

1 spine, normal/near normal range of motion of upper and lower extremities, 5/5  
2 motor strength of lumbar spine and lower extremities, normal muscle bulk and  
3 tone, intact sensation, intact deep tendon reflexes, and normal gait and station. Tr.  
4 32, 423-24, 426-27, 441, 453, 456, 471, 474-75, 493-94, 501-02, 513, 522, 526-27,  
5 565, 572, 587, 618. Finally, the ALJ noted that despite his description of “chronic  
6 severe pain,” prior to September 17, 2019 treatment providers consistently noted  
7 that Plaintiff was pleasant, well-appearing, and in no acute distress. Tr. 32, 423,  
8 426, 440, 453, 456, 471, 474, 487, 493, 498, 501, 513, 522, 526, 571, 582, 586,  
9 610, 616.

10 In response, Plaintiff summarizes evidence acknowledged by the ALJ in his  
11 decision, including findings of moderate arthritis in Plaintiff’s elbow, a long  
12 treatment history for migraines, and moderate arthritic changes in the lumbar spine.  
13 ECF No. 14 at 17. Plaintiff also cites March 2017 imaging that noted “no acute  
14 findings” as well as “chronic displaced C7 and T1 spinous process avulsion  
15 fractures”); and the September 17, 2019 MRI finding of “maceration/degeneration  
16 of the anterolateral labrum and superimposed tears of the labrum,” which the Court  
17 notes is the precise date the ALJ found Plaintiff became disabled due to a fall. Tr.  
18 508. Finally, in his reply brief, Plaintiff argues that the opinions of Dr. Dinglasan  
19 and Dr. DeGooyer are “based upon objective findings and diagnosed medical  
20 impairments that proclaim severe limitations.” ECF No. 17 at 6. However, as  
21 discussed below, the ALJ properly found these opinions were not persuasive.

1 Moreover, the “mere diagnosis of an impairment ... is not sufficient to sustain a  
2 finding of disability.” *Kay v. Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985). Thus,  
3 regardless of evidence that could be considered favorable to Plaintiff, the Court  
4 finds it was reasonable for the ALJ to find the severity of Plaintiff’s symptom  
5 claims before September 17, 2019 was inconsistent with objective findings from  
6 the longitudinal record. Tr. 567-69. “[W]here evidence is susceptible to more than  
7 one rational interpretation, it is the [Commissioner’s] conclusion that must be  
8 upheld.” *Burch*, 400 F.3d at 679. This was a clear and convincing reason,  
9 supported by substantial evidence, for the ALJ to discount Plaintiff’s symptom  
10 claims prior to the established onset date of disability.

11 *2. Failure to Comply with Treatment*

12 Second, the ALJ briefly noted that in May 2017, Plaintiff complained of  
13 migraines but “he admitted that he does not like to be on pain medications. This  
14 shows his unwillingness to comply with his treatment plan.” Tr. 32. Unexplained,  
15 or inadequately explained, failure to seek or comply with treatment may be the  
16 basis for rejecting Plaintiff’s symptom claims unless there is a showing of a good  
17 reason for the failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). In support  
18 of this finding the ALJ cites the May 2017 report by Plaintiff that “he does not like  
19 to be on pain medications”; and his June 2018 report that he stops taking pain  
20 medications when they “are not working” and he cannot reach medical providers.  
21 Tr. 348, 472. The Court finds that this single report by Plaintiff that he did not *like*

1 to take pain medication, without further indication as to whether he did, in fact,  
2 take pain medication, and another single report that he stopped taking medication  
3 when it was not working and he could not reach his medical provider, do not rise to  
4 the level of substantial evidence to discount the entirety of Plaintiff's symptom  
5 claims. As noted by Plaintiff, and acknowledged by the ALJ in the decision,  
6 Plaintiff took many prescribed an over-the-counter-medications throughout the  
7 relevant adjudicatory period, and the Court notes that at a July 2017 treatment visit,  
8 several months after the May 2017 visit cited by the ALJ in support of this finding,  
9 Plaintiff was actually advised to "cut down" on over the counter and prescription  
10 pain medication. *See* Tr. 471. Based on the foregoing, this was not a clear and  
11 convincing reason, supported by substantial evidence, for the ALJ to discount  
12 Plaintiff's symptom claims. However, any error is harmless because, as discussed  
13 herein, the ALJ's ultimate rejection of Plaintiff's symptom claims was supported  
14 by substantial evidence. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d  
15 1155, 1162-63 (9th Cir. 2008).

### 16 3. Improvement

17 Third, the ALJ noted that the record "shows that [Plaintiff's] physical  
18 symptoms are generally well controlled or stable when he is compliant with  
19 treatment." Tr. 32. A favorable response to treatment can undermine a claimant's  
20 complaints of debilitating pain or other severe limitations. *See Tommasetti v.*  
21 *Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008); *see Warre v. Comm'r of Soc. Sec.*

1 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled  
2 with medication are not disabling for purposes of determining eligibility for  
3 benefits). In support of this finding, the ALJ cited Plaintiff's denial of migraine  
4 symptoms in March 2018; his mother's report in May 2018 that Plaintiff's  
5 headaches were "pretty much under control"; Plaintiff's report in June 2018 that he  
6 did not have pain, weakness, arthritis, joint swelling, muscle cramps, leg pain,  
7 falls, vertigo, or difficulty walking; Plaintiff's report in July 2018 that his  
8 headaches had reduced to "episodic"; his treating provider's July 2018 report that  
9 his migraines were stable; his report in September 2018 that he had stopped taking  
10 medications and his migraines were "more controllable"; and the overall lack of  
11 "acute" headache complaints at treatment visits across the medical record. Tr. 32-  
12 33 (citing Tr. 416 (reporting no migraines since he got Tragus piercings on both  
13 ears), 440, 441 (noting migraine headaches were stable), 516, 608 (noting that  
14 Plaintiff tapered off migraine medication after he got his piercing, and reporting  
15 only occasional and less intense headaches), 610 (chronic headache has "resolved  
16 to episodic migraines and fewer headaches).

17 Plaintiff initially asserts that "there is no proof of improvement," and then,  
18 without specific citation to the record, argues that perhaps the "level of  
19 improvement is only that the pain, particularly the migraines, went from severe  
20 every day to severe most days." ECF No. 14 at 9-10 (also arguing that a "closer  
21 look at the chart notes explain[s] that the migraines went from daily and severe to



1 ‘occasional’ or ‘intermittent’ in July 2018”). However, this evidence would seem  
2 to further support the ALJ’s finding that Plaintiff’s migraines had improved at least  
3 with regard to frequency. Moreover, regardless of evidence that could be  
4 considered favorable to Plaintiff, longitudinal evidence of improvement in  
5 Plaintiff’s migraines with treatment modalities is inconsistent with his allegations  
6 of entirely incapacitating limitations. *See Burch v. Barnhart*, 400 F.3d 676, 679  
7 (9th Cir. 2005) (where evidence is susceptible to more than one interpretation, the  
8 ALJ’s conclusion must be upheld). This was a clear and convincing reason to  
9 discredit Plaintiff’s symptom claims.

#### 10 4. *Daily Activities*

11 Fourth, and finally, the ALJ found that Plaintiff’s activities of daily living,  
12 including work activities and social interaction, are inconsistent with his  
13 allegations of severely limiting symptoms. Tr. 34. A claimant need not be utterly  
14 incapacitated in order to be eligible for benefits. *Fair*, 885 F.2d at 603; *see also*  
15 *Orn*, 495 F.3d at 639 (“the mere fact that a plaintiff has carried on certain activities  
16 . . . does not in any way detract from her credibility as to her overall disability.”).  
17 Regardless, even where daily activities “suggest some difficulty functioning, they  
18 may be grounds for discrediting the [Plaintiff’s] testimony to the extent that they  
19 contradict claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1113.

20 In support of this finding, the ALJ cited Plaintiff’s reports during the  
21 adjudicatory period that he took care of his own personal care, took care of his

1 mother and her farm animals, did household chores, helped his mother maintain  
2 her property, mowed the lawn, did some repair work, played video games, shopped  
3 in stores, went to the recycling center regularly, used a checkbook, drove a car,  
4 visited his girlfriend, and spent time with his mother and friends. Tr. 34, 339-43,  
5 353, 624, 676-77, 684-85. The ALJ also noted that Plaintiff “routinely stated that  
6 he walks for exercise four times a week,” and “walks to places.” Tr. 34, 341, 458,  
7 539, 563, 570, 580-81, 585. Finally, the ALJ cited ongoing evidence that Plaintiff  
8 has worked as a tree trimmer during the period at issue, and continues to work on  
9 his mother’s farm. Tr. 34, 472 (reported working as a tree trimmer), 497, 624  
10 (noting Plaintiff had “high activity tolerance” and is able to mow 2 acres of pasture  
11 using a push lawn mower with minimal breaks), 676-77, 684-85. The ALJ then  
12 concluded that “[t]he fact that the impairments did not prevent [Plaintiff] from  
13 trimming trees intermittently and working in a farm strongly suggests that the  
14 alleged limitations due to back pain, migraine headaches, dizziness, fatigue, and  
15 depression were not as severe as alleged.” Tr. 34.

16 Plaintiff generally argues that “[n]one of the activities outlined by the ALJ  
17 as to activities of daily living take up a substantial portion of his day or indicate  
18 transferability to a work environment where there is no opportunity to take breaks  
19 for rest and medication.” ECF No. 14 at 18 (citing *Fair*, 885 F.2d at 597 (“many  
20 home activities are not easily transferable to what may be the more grueling  
21 environment of the workplace, where it might be impossible to periodically rest or

1 take medication”). In his reply brief, Plaintiff further argues, without citation to  
2 the record, that the medical records reference “an occupation” but “are unclear  
3 whether that is a past occupation or present.” ECF No. 17 at 10. However, the  
4 records cited by the ALJ in support of this finding clearly indicate that Plaintiff  
5 was reporting work he was undertaking during the relevant adjudicatory period.  
6 *See* Tr. 472, 497, 624, 676-77, 684-85. Moreover, it was reasonable for the ALJ to  
7 conclude that Plaintiff’s documented activities, including working as a tree  
8 trimmer, managing a farm and maintaining property, taking care of his mother, and  
9 shopping in stores, were inconsistent with his allegations of entirely debilitating  
10 functional limitations. *See Molina*, 674 F.3d at 1113 (Plaintiff’s activities may be  
11 grounds for discrediting Plaintiff’s testimony to the extent that they contradict  
12 claims of a totally debilitating impairment). Thus, the Court finds this was a clear  
13 and convincing reason, supported by substantial evidence, to discount Plaintiff’s  
14 symptom claims.

15 The Court concludes that the ALJ provided clear and convincing reasons,  
16 supported by substantial evidence, for rejecting Plaintiff’s symptom claims.

### 17 **B. Medical Opinions**

18 For claims filed on or after March 27, 2017, new regulations apply that  
19 change the framework for how an ALJ must evaluate medical opinion evidence.  
20 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL  
21 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c.

1 The new regulations provide that the ALJ will no longer “give any specific  
2 evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*, 2017 WL  
3 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §§ 404.1520c(a),  
4 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all  
5 medical opinions or prior administrative medical findings from medical sources.  
6 20 C.F.R. §§ 404.1520c(a) and (b), 416.920c(a) and (b). The factors for evaluating  
7 the persuasiveness of medical opinions and prior administrative medical findings  
8 include supportability, consistency, relationship with the claimant (including  
9 length of the treatment, frequency of examinations, purpose of the treatment,  
10 extent of the treatment, and the existence of an examination), specialization, and  
11 “other factors that tend to support or contradict a medical opinion or prior  
12 administrative medical finding” (including, but not limited to, “evidence showing a  
13 medical source has familiarity with the other evidence in the claim or an  
14 understanding of our disability program’s policies and evidentiary requirements”).  
15 20 C.F.R. §§ 404.1520c(c)(1)-(5), 416.920c(c)(1)-(5).

16 Supportability and consistency are the most important factors, and therefore  
17 the ALJ is required to explain how both factors were considered. 20 C.F.R. §§  
18 404.1520c(b)(2), 416.920c(b)(2). Supportability and consistency are explained in  
19 the regulations:

20 (1) *Supportability*. The more relevant the objective medical evidence  
21 and supporting explanations presented by a medical source are to  
support his or her medical opinion(s) or prior administrative medical

1 finding(s), the more persuasive the medical opinions or prior  
2 administrative medical finding(s) will be.

3 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
4 administrative medical finding(s) is with the evidence from other  
5 medical sources and nonmedical sources in the claim, the more  
6 persuasive the medical opinion(s) or prior administrative medical  
7 finding(s) will be.

8 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). The ALJ may, but is not  
9 required to, explain how the other factors were considered. 20 C.F.R. §§  
10 404.1520c(b)(2), 416.920c(b)(2). However, when two or more medical opinions  
11 or prior administrative findings “about the same issue are both equally well-  
12 supported ... and consistent with the record ... but are not exactly the same,” the  
13 ALJ is required to explain how “the other most persuasive factors in paragraphs  
14 (c)(3) through (c)(5)” were considered. 20 C.F.R. §§ 404.1520c(b)(3),  
15 416.920c(b)(3).

16 Plaintiff argues the ALJ erroneously considered the opinions of treating  
17 providers Catherine Dinglasan, M.D. and Brett DeGooyer, D.O. ECF No. 14 at 11-  
18 14. In October 2019, Dr. Dinglasan opined that Plaintiff can sit for 2-3 hours  
19 during an 8-hour workday, stand for 1 hour during an 8-hour workday, and walk  
20 for 1 hour during an 8-hour workday. Tr. 694. She further opined that Plaintiff  
21 can lift up to 10 pounds occasionally; he will need more than scheduled breaks of  
10 minutes or more throughout the day; he is likely to miss work or leave early 2-3  
days per month due to flare-up of symptoms; and he is likely to experience marked  
problems with focus and concentration for extended periods. Tr. 694-96. Finally,

1 Dr. Dinglasan noted that these limitations “would be appropriate” from January 1,  
2 2017 to October 2019. Tr. 694-97. Dr. DeGooyer concurred with the limitations  
3 opined by Dr. Dinglasan.

4 With regard to Plaintiff’s RFC prior to the established onset date of  
5 disability, the ALJ found Dr. Dinglasan and Dr. DeGooyer’s opinions unpersuasive  
6 for several reasons. Tr. 35-36. First, as to consistency, the ALJ found the opinions  
7 were not persuasive because they were not supported by the record as a whole,  
8 including objective findings, treatment notes, evidence of improvement with  
9 treatment, and documented daily activities and work activities.<sup>4</sup> Tr. 35. Plaintiff  
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11 <sup>4</sup> Plaintiff also argued, without specific citation from the record, that the ALJ erred  
12 by not considering the consistency of the opinions of Dr. Dinglasan and Dr.  
13 DeGooyer, as they are “almost identical.” ECF No. 14 at 13. This argument is  
14 inapposite. Dr. DeGooyer’s statement was indistinguishable from Dr. Dinglasan’s,  
15 as he merely added his signature and “concurred” with Dr. Dinglasan’s opinion,  
16 with the single added note that Plaintiff “has left hip pathology with a  
17 macerated/degenerative labrum, as found by MRI evaluation.” Tr. 704. For this  
18 reason, the ALJ properly considered the opinions jointly, and the Court has done  
19 the same. Moreover, as discussed in detail above, the ALJ properly considered the  
20 consistency of these opinions with evidence from the medical and non-medical  
21 sources, as per the new regulations.

1 argues that the only evidence of improvement was chart notes indicating that  
2 Plaintiff's migraines "went from daily and severe to 'occasional' or 'intermittent'  
3 in July 2018," and that "[t]his is not the 'improvement' that might change or  
4 undermine the statements of two treating sources." ECF No. 14 at 10, 14 (noting  
5 headache diary kept by Plaintiff's mother indicated that he went from "daily 10/10  
6 headaches to lesser, but still severe headaches"). However, the ALJ cited  
7 consistent evidence of improvement throughout the longitudinal record, including  
8 reports by Plaintiff and his mother that his headaches improved dramatically after  
9 he got Tragus piercings in his ears. Tr. 35, 416, 427, 441 (migraines noted to be  
10 stable), 608 (reporting occasional migraines at 3-4/10 intensity). Moreover, while  
11 not addressed by Plaintiff, the ALJ properly relied on objective tests and clinical  
12 findings that were inconsistent with the statements of Dr. Dinglasan and Dr.  
13 DeGooyer, including mild imaging results of lumbar spine; no "acute findings" in  
14 cervical spine imaging; no acute findings in right elbow imaging; and treatment  
15 notes observing "no signs of significant pain," 5/5 motor strength, normal gait,  
16 normal range of motion, intact sensation, normal reflexes, and normal neurologic  
17 examination results. Tr. 35, 397, 423, 426, 440-41, 447, 453, 456, 471, 474, 493-  
18 94, 501-02, 507-08, 510, 513, 522, 526-27, 571-72, 582, 586-87, 616, 618.

19 Plaintiff additionally argues that the ALJ "overstated" his level of activity,  
20 and cites his report in July 2018 that he could not prepare his own meals, played  
21 video games only when he did not have a migraine, did "some" repairs, shopped in

1 stores only every few weeks, could only walk to “the end of the pasture,” and  
2 needed his mother’s help to feed the animals. ECF No. 14 at 9 (citing Tr. 339-43).  
3 However, as noted in the ALJ’s decision, the record is replete with Plaintiff’s  
4 reports to treating providers during the relevant adjudicatory period that he worked  
5 as a tree trimmer, exercised regularly, and did yard work. Tr. 35, 437, 472, 497,  
6 539-40, 563, 570, 580-81, 624 (noting high activity tolerance), 684 (did a lot of  
7 work on family farm), 688. Thus, it was reasonable for the ALJ to find Dr.  
8 Dinglasan and Dr. DeGooyer’s opinions were inconsistent with the longitudinal  
9 medical record, including consistent reports of improvement, and Plaintiff’s  
10 documented daily activities and work activities.

11 Second, as to supportability, the ALJ noted Dr. Dinglasan and Dr.  
12 DeGooyer’s “brief” treatment history with Plaintiff, and found “neither of them  
13 has declared in his or her Medical Source Statement that the basis for his/her  
14 opinion is based on a review of the existing medical record. Therefore, it is  
15 unclear what they based the opinions upon other than the attached reports for the  
16 October 2019 imaging of [the] lumbar spine and February 2016 imaging of the  
17 right elbow.” Tr. 35-36. Plaintiff argues that he was treated by Dr. Dinglasan at  
18 “6-7 visits spread over 2 years” as opposed to the “only very few occasions” noted  
19 by the ALJ. ECF No. 14 at 13. However, the Court finds it reasonable for the ALJ  
20 to determine that 6-7 visits, spread over the course of the entire adjudicatory  
21 period, was as a relatively “brief” treatment history. *See Tommasetti*, 533 F.3d at



1 1040 (ALJ may draw inferences logically flowing from evidence); 20 C.F.R. §§  
2 404.1520c(c)(3), 416.920c(c)(3) (relationship with the claimant is a factor in  
3 evaluating the persuasiveness of an opinion, including length of the treatment,  
4 frequency of examinations, purpose of the treatment, extent of the treatment, and  
5 the existence of an examination). Moreover, and more notably, Plaintiff fails to  
6 challenge the ALJ's finding that Dr. Dinglasan and Dr. DeGooyer's opinions did  
7 not include any objective findings from the "existing medical record" as a basis for  
8 their opinions, aside from one imaging report from February 2016, and another  
9 from October 2019. Tr. 35-36. As noted by the ALJ, the February 2016 imaging  
10 report of Plaintiff's elbow showed no joint effusion, normal alignment without  
11 fracture or dislocation, and no periarticular soft tissue calcifications; and "[a]s for  
12 the October 2019 spine imaging, the ALJ agreed that Plaintiff was disabled  
13 beginning September 17, 2019." ECF No. 16 at 14 (citing Tr. 37, 510). Thus, it  
14 was reasonable for the ALJ to find Dr. Dinglasan and Dr. DeGooyer's opinions  
15 were unpersuasive because they failed to provide the requisite explanation to  
16 support their opinions under the new regulations.

17 As a final matter, Plaintiff generally alleges that the ALJ improperly found  
18 the statements of Dr. Dinglasan and Dr. DeGooyer unpersuasive "for the period  
19 from 2017 to 2019, and then persuasive after September 2019"; and that the ALJ  
20 "deemed [the opinions] unsupported for the period of time before September 2019,  
21 when [Plaintiff] turned 50, and then deems them supported as of September 2019."

1 ECF No. 14 at 9, 13. This argument mischaracterizes the specific findings of the  
2 ALJ. First, as discussed in detail above, the ALJ found that prior to the disability  
3 onset date of September 17, 2019, Plaintiff could perform light work, but also  
4 assessed a number of non-exertional limitation. Tr. 30. However, the ALJ  
5 subsequently found that beginning on September 17, 2019, Plaintiff was limited to  
6 sedentary work, with the same non-exertional limitations assessed in the RFC prior  
7 to the onset date of disability. Tr. 37. In support of this finding, the ALJ cited  
8 Plaintiff's report in August 2019 that he had increased hip and back pain after a  
9 fall; September 17, 2019 imaging that revealed a "new and significant right hip  
10 labrum tear"; a September 17, 2019 examination that observed abnormal gait,  
11 unsteady balance, significant reduced range of motion of the hip and lumbar spine  
12 with pain and tenderness, and positive straight leg test on the left; diagnosis of SI  
13 joint dysfunction and left anterior labral degenerative changes, lumbar  
14 degenerative changes, and strain of the left gluteus max muscle; and an October  
15 2109 MRI scan indicating worsened lumbar degenerative disc disease with  
16 multilevel annular tears as well as canal and foraminal stenosis. Tr. 37 (citing Tr.  
17 646, 649-51, 677, 698-99, 705-06).

18 As to the opinions of Dr. Dinglasan and Dr. DeGooyer, the ALJ explicitly  
19 found that after the established onset date of disability, their opinion that Plaintiff  
20 was restricted to a sedentary exertional level was "consistent with evidence  
21 received at the hearing level, including objective findings, and [Plaintiff's]

1 presented symptoms and restrictions at examinations since the established onset  
2 date.” Tr. 38, 646, 649-51, 677, 698-99, 705-06. However, despite Plaintiff’s  
3 general argument to the contrary, the ALJ went on to find that the non-exertional  
4 limitations assessed by Dr. Dinglasan and Dr. DeGooyer remained unpersuasive  
5 for the same valid reasons discussed in detail above. The Court does not discern,  
6 nor does Plaintiff offer any specific argument in his opening brief, that the ALJ  
7 improperly considered the opinions as of the disability onset date of September 17,  
8 2019. *See Carmickle*, 533 F.3d at 1161 n.2 (court may decline to address issue not  
9 raised with specificity in Plaintiff’s briefing).

10 Based on the foregoing, the Court finds no error in the ALJ’s consideration  
11 of Dr. Dinglasan and Dr. DeGooyer’s opinions.

### 12 **C. Step Five**

13 Finally, Plaintiff argues the ALJ improperly rejected the limitations opined  
14 by Dr. Dinglasan and Dr. DeGooyer,<sup>5</sup> and therefore, the ALJ erred at step five by  
15 posing an incomplete hypothetical to the vocational expert. ECF No. 11 at 18.

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17 <sup>5</sup> Plaintiff also generally argues that the ALJ “failed to include severe mental  
18 restrictions.” ECF No. 14 at 19. The Court declines to address this argument  
19 because Plaintiff fails to challenge the ALJ’s consideration of the mental health  
20 opinions, or Plaintiff’s claimed mental health symptoms. *See Carmickle*, 533 F.3d  
21 at 1161 n.2).

1 Plaintiff is correct that “[i]f an ALJ's hypothetical does not reflect all of the  
2 claimant's limitations, the expert's testimony has no evidentiary value to support a  
3 finding that the claimant can perform jobs in the national economy.” *Bray v.*  
4 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir.2009) (citation and  
5 quotation marks omitted). However, as discussed in detail above, the ALJ's  
6 rejection of the medical opinions was supported by the record and free of legal  
7 error. The hypothetical proposed to the vocational expert contained the limitations  
8 reasonably identified by the ALJ and supported by substantial evidence in the  
9 record. Thus, the ALJ did not err at step five.

## 10 CONCLUSION

11 A reviewing court should not substitute its assessment of the evidence for  
12 the ALJ's. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must  
13 defer to an ALJ's assessment as long as it is supported by substantial evidence. 42  
14 U.S.C. § 405(g). As discussed in detail above, the ALJ provided clear and  
15 convincing reasons to discount Plaintiff's symptom claims, and properly  
16 considered the medical opinion evidence. After review, the Court finds the ALJ's  
17 decision is supported by substantial evidence and free of harmful legal error.

## 18 ACCORDINGLY, IT IS HEREBY ORDERED:

- 19 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is **DENIED**.
- 20 2. Defendant's Motion for Summary Judgment, ECF No. 16, is

21 **GRANTED.**

1 The District Court Executive is hereby directed to enter this Order and  
2 provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE**  
3 the file.

4 **DATED** November 4, 2021.

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7 LONNY R. SUKO  
8 Senior United States District Judge  
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